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JOHN T. FEY, Clerk

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1956

No. 1079

DON W. WHITE; B. C. THOMPSON and ALVIN HANSON, d b a KITSAP AUTOMATIC DISPENSER CO.; F. M. HIGGINS; WM. J. HIGGINS, PETER S. HIGGINS, and DALE FISHER, d b a AUTOMATIC MERCHANDISERS; SPACARB OF THE NORTHWEST, INC., a Washington Corporation; ORIE A. SMALL and JAMES P. WORDEN, JR., d b a PACIFIC AUTOMATIC; FRANK RUSSO, d b a EVERGREEN BEVERAGE CO.; C. J. CLAUSEN, JR., d b a INLAND VENDING SERVICE; CARTER W. DULLANTY and GEORGE K. LINDBERG, d b a BEVERAGE VENDING SERVICE COMPANY; AUTOMAT CO., INC., a Washington corporation; JOHN NECHANICKY and VIT NECHANICKY, d b a CANTEEN COMPANY OF WASHINGTON; RICHARD F. NECHANICKY, d b a AUTOMATIC CANTEEN CO. OF SPOKANE, *Appellants*,

v.

STATE OF WASHINGTON, *Appellee*.

ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

JOHN J. O'CONNELL,
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KEITH GRIM,
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ON APPEAL FROM THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION TO DISMISS OR AFFIRM

Appellee, pursuant to rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment of the Supreme Court of Washington be affirmed on the ground that the questions on which the decision of this cause depends are so unsubstantial as not to need further argument. In the alternative appellee moves that the appeal be dismissed on the ground that it does not present a substantial Federal question.

I.

STATEMENT OF FACTS AND ISSUES ON APPEAL

This appeal is from a decision of the Washington Supreme Court rendered January 28, 1957, reported at 149 Wash. Dec. 684, 306 P. (2d) 230, holding that appellants are not entitled to any refund of sales tax paid to the state of Washington.

Appellants sell merchandise through automatic vending devices at prices ranging from 5¢ to 13¢. Such sales are subject to Washington's sales tax and appellant paid to the state the correct amount of tax on all such sales made by them. Contrary to appellants' assertions, *all* sellers are required to pay tax to the state in an amount determined by multiplying their total gross sales by the rate (3%) of the tax whether they collect the tax from their buyers or not and regardless of whether such failure to collect it results from conditions beyond their control. Those selling through vending machines are expressly authorized by the statute to absorb the tax.

Washington's sales tax law requires sellers to collect the tax from buyers in accordance with a collection schedule promulgated by the Tax Commission. The collection schedule adopted by the commission provides that no tax shall be collected from the buyer on sales for less than 14¢. One cent of tax is to be collected by the seller on sales from 14¢ to 49¢, two cents on sales from 50¢ to 84¢, three cents on sales from 85¢ to $1.14, and so on. The schedule is thus formulated so that the aggregate collection by sellers will equal the amount of tax imposed under the statute as nearly as is possible and reasonable by the use of Federal coins.

The issue, simply stated, is whether the one who pursues a business in which all his sales are for less than 14¢ is unconstitutionally discriminated against by a statute which requires all sellers to pay to the state sales tax computed upon total gross sales, and which authorizes a collection schedule which provides that all sellers shall collect no tax upon sales below 14¢.

II.

ARGUMENT

No substantial Federal question is presented.

Appellants contend that the state's demand from them violates the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution. Appellants assert such issue is presented because the tax is imposed upon sellers who vend articles for less than thirteen

cents, while no such tax is imposed upon other sellers. This is not so.

It is the clear holding of the Washington Supreme Court that *all* sellers must remit 3% of their total gross sales to the state as tax. Thus, for example, drug, variety and ten cent stores and hot dog stands each pay to the state as sales tax 3% of their total gross sales, regardless of how much tax they may collect from their customers. Usually the amount of tax collected from their customers by such stores will approximate the amount that they must remit to the state, because under the schedule they will overcollect on some items, while undercollecting on others.

Appellants, however, are unable to recover the tax as do most businesses simply because they limit all their sales to amounts for which no tax is to be collected from buyers under the schedule. This consequence, which results entirely from appellants' method of doing business, produces the alleged discrimination. This identical issue concerning the effects of a collection schedule on vendors of low priced articles has been presented to the highest appellate courts of six other states. Each court has upheld the constitutionality of the tax as applied:

State v. Woods (1942), 242 Ala. 184, 5 So. (2d) 732;

State v. Baker's Ice Cream Service, Inc., (1950), 254 Ala. 311, 48 So. (2d) 230;

Stevens Enterprises, Inc. v. State Tax Comm'n, (1956) 179 Kan. 696, 298 P. (2d) 326;
F. W. Woolworth Co. v. Gray, (1951) 77 N. D. 757, 46 N. W. (2d) 295;
Wilson v. City of Philadelphia, (1938) 330 Pa. 350, 198 Atl. 893;
Smoky Mountain Canteen Co. v. Kizer, (1952) 193 Tenn. 598, 247 S. W. (2d) 69;
W. F. Jensen Candy Co. v. State Tax Comm'n, (1936) 90 Utah 359, 61 P. (2d) 629.

See also:

Roth Drugs v. Johnson, (1936) 13 Cal. App. (2d) 720, 57 P. (2d) 1022;
Mouledoux v. Maestri, (1941) 197 La. 525, 2 So. (2d) 11;
W. S. Libbey Co. v. Johnson, (1953) 148 Me. 410, 94 A. (2d) 907;
W. T. Grant Co. v. Joseph, (1957) 2 N. Y. (2d) 196, 140 N. E. (2d) 244.

There is contrary *dicta* in one opinion: *Winslow-Spacarb, Inc. v. Evatt*, (1945) 144 Ohio 471, 59 N. E. (2d) 924.

The fact that most of the above cases arose in states where the sales tax is imposed directly on the vendor, rather than upon the buyer, as is Washington's tax, is immaterial here, for under either type of tax the complaining taxpayers were unable to collect the tax from their buyers because all of their sales were for amounts below the minimum of the bracket, whereas their competitors, who sold items variously priced, were able to recoup the tax from their customers. No more discrimination exists

under the one type of tax than under the other. Substance, not form, controls.

> "In passing on the constittionality of a tax law 'we are concerned only with its practical operation, not its definition or the precise form of the descriptive words which may be applied to it.'" *Nelson v. Sears, Roebuck & Co.*, 312 U. S. 359, 85 L. ed. 888, 61 S. Ct. 586.

A. The Schedule Does Not Discriminate Against Appellants

Appellants apparently contend that the mere establishment of a collection schedule thereby classifies all sellers who choose to limit themselves to one bracket within the schedule. But the collection schedule applies uniformly to every single retailer in the State of Washington—none are excepted, all are treated alike. The particular effects upon appellants which flow from the schedule are entirely the result of appellants' chosen methods of doing business.

The schedule does classify sales by amounts for purposes of fixing the amount of tax to be collected upon each sale. But such classification applies alike to every retailer. It has no specific application to appellants as a separate group; it applies generally.

> "The operation of a general rule will seldom be the same for everyone. If the accidents of trade lead to inequality or hardship, the consequences must be accepted as inherent in government by law instead of government by edict." *Fox v. Standard Oil Co. of New Jersey*, (1934) 294 U. S. 87, 79 L. ed. 780, 55 S. Ct. 333.

B. The Schedule is Reasonable and Founded on Just Considerations of Tax Policy

The Fourteenth amendment was not intended to compel a state to adopt an iron rule of equal taxation. *Bell's Gap R. Co. v. Penna.* (1889), 134 U. S. 232, 33 L. ed. 892, 10 S. Ct. 533.

The presumption of constitutionality of a state tax can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes. *Madden v. Kentucky* (1939), 309 U. S. 83, 84 L ed. 590, 60 S. Ct. 406.

> "Any classification however is permissible which has a reasonable relation to some permitted end of governmetnal action, * * * It is enough, for instance, if the classification is reasonably founded in 'the purposes and policy of taxation.'" *Watson v. State Comptroller*, (1920) 254 U. S. 122 at 125, 65 L. ed. 170, 41 S. Ct. 43.

The purpose of the collection schedule is to provide a workable system for collection of the sales tax by retailers through the exclusive use of Federal coins. By providing that sellers shall absorb the tax when it amounts to less than one half of a cent and that buyers shall pay a full cent of tax where the tax due is more than one half a cent, the need for burdensome tax tokens or scrip is obviated. Further, computation of the amount of tax to be paid on a given transaction is made much easier. Sellers and buyers alike are provided with a reasonable, common sense method for payment of the sales tax, which at

best is a troublesome matter. These are the reasons for the adoption and application of the schedule.

That the schedule affects appellants adversely because of the way they happen to conduct business is quite fortuitous. Its consequences as to them are not the result of hostile or arbitrary discrimination on the part of the legislature but flow from their own business arrangements. The legislature is not required to make meticulous adjustments in an effort to avoid incidental hardships. *New York Rapid Transit Corp. v. N. Y. C.*, (1937) 303 U. S. 573, 82 L. ed. 1024, 58 S. Ct. 721.

If the selection or classification is neither capricious nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the equal protection of the law. *Brown-Forman Co. v. Kentucky*, (1909) 217 U. S. 563, 54 L. ed. 883, 30 S. Ct. 578.

The convenience afforded the public through application of a collection schedule justifies, indeed demands, such a schedule. But a schedule must have a beginning—a minimum sum below which no tax is to be collected. Such a classification is reasonable, and fully justified by considerations of sound tax policy.

Administrative convenience and expense in the collection or measurement of the tax are alone a sufficient justification for a difference in tax treatment of small incomes or small taxpayers and that meted

out to others. *Carmichael v. Southern Coal Co.*, (1937), 301 U. S. 495, 81 L. ed. 1250, 57 S. Ct. 868. Different treatment may be accorded two kinds of tax subjects because of differences in the difficulties and expense of tax collection between those subjects. *Madden v. Kentucky*, (1939) 309 U. S. 83, 84 L. ed. 590, 60 S. Ct. 406.

Wherefore, appellee prays that the appeal in this case be dismissed or, in the alternative, that the judgment herein be affirmed.

Respectfully submitted,

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